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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 391

E. E. ASHCRAFT AND JOHN WARE,

Petitioners,

vs.

STATE OF TENNESSEE.

SUPPLEMENTAL BRIEF FOR PETITIONERS.

GROVER N. MCCORMICK,

JAMES F. BICKERS,

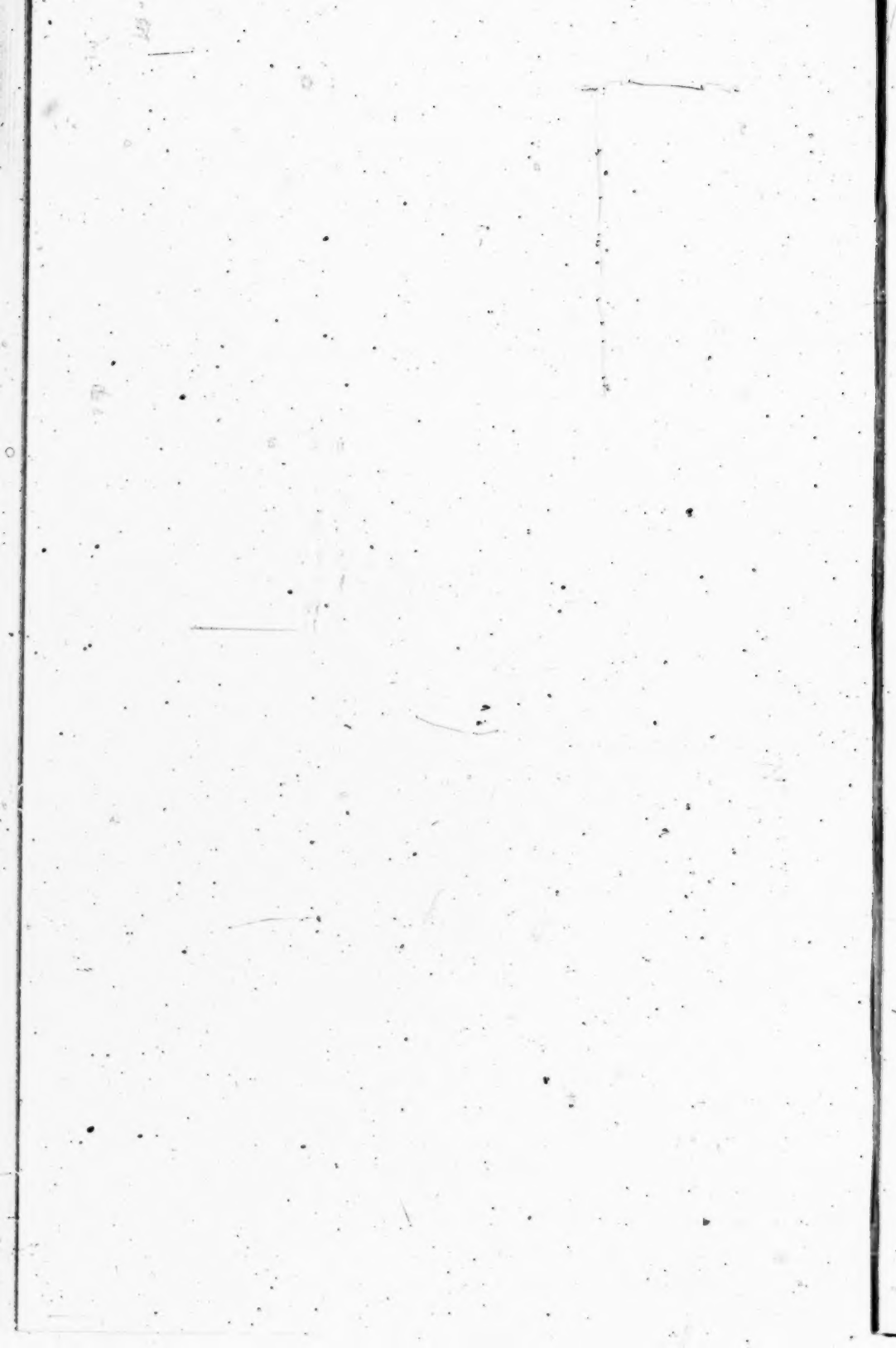
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E. E. Ashcraft and John Ware.

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MAY IT PLEASE THE COURT:

We have just been furnished a printed copy of an additional brief filed in behalf of the respondent, State of Tennessee, in this case, and after consideration, we deem it appropriate in aid of the court to file a short reply thereto.

It is observed that no question as to the jurisdiction of this court to entertain this case is made by the State of Tennessee, nor could any jurisdictional question, as we assert, be presented.

The direct question for consideration by this honorable court is clearly presented in our petition for certiorari. An attack is made upon the alleged confessions of these defendants and their use as evidence against them and the manner in which they were allegedly secured. It must be noted that upon these alleged confessions alone, they stand

convicted, with a sentence of ninety-nine years decreed. It is asserted that the manner in which these alleged confessions were obtained and the treatment of these defendants generally by the officers of Shelby County, Tennessee, in collaboration with the District Attorney General and his assistant, Mr. Battle, constituted a violation of their constitutional rights both under the fifth amendment of the Constitution of the United States, and of the fourteenth amendment of the Constitution of the United States, and particularly the "due process" clause of said amendment, and also their rights under the constitution of the State of Tennessee.

It is observed that the additional brief filed in behalf of the respondent is in large measure a restatement and a reiteration of the arguments set forth in behalf of the state in the brief filed in opposition to the issuance of the writ of certiorari prayed for.

Now what do we find in these briefs by way of admissions?

On page 3 of the State's brief in opposition to the issuance of the writ of certiorari herein, we find the following:

"(a) Ashcraft. There are certain disputed facts in connection with the confession of petitioner Ashcraft, and others which are not disputed. Briefly, that any violence, threats or deprivation of food and water was had, is definitely disputed. That Ashcraft was kept in this room from about seven P. M. on Saturday, June 14th, until about eleven P. M. on Sunday, June 15th, or a period of some twenty-eight hours is not controverted in the record. Likewise, it is not controverted in the record the petitioner Ashcraft was not advised of his statutory right to counsel nor was he warned of his right against self incrimination."

We interpolate here to say that counsel is in error in reference to his twenty-eight hours. It was more than thirty-six

hours. Where counsel becomes confused is that for a half hour or so, Ashcraft was taken with the officers in an effort to locate the home of the defendant, Ware. This half hour was the only period of time in which Ashcraft was out of the room on the fifth floor of the county jail of Shelby County. He was then still in the custody and control of the officers, and the attorney general.

We further find on page 8 of the original brief filed in behalf of the state, the following:

"As above stated, it is undisputed that Ashcraft was held from seven P. M. until eleven P. M. the following night without a warrant having been sworn out for him, and that he was not notified of his statutory right to counsel, or his constitutional right against self incrimination."

Again on page 12 of this same brief, we find the following admission:

"There still remains the question as to the confinement of Ashcraft for approximately twenty-eight hours before any statement was obtained from him, during which time he was being continually questioned. Obviously, this is undisputed in the record. The respondent recognizes full well the force of the decisions of this Court, the most recent of which appears to be *Ward v. Texas*, 316 U. S. 547, wherein the earlier cases are collated."

Again we find on page 15 of the second brief filed in behalf of the State of Tennessee, the following:

"But there are certain undisputed facts in connection with the making of the confession in question. These are that Ashcraft was detained for approximately 36 hours before making such confession and that he was unattended by friends and without the advice of counsel. In passing, it might be noted that he makes no claim to have requested either with a subsequent denial thereof."

"It is perfectly true that this Court in a number of cases has stated that this Court will not hesitate to set aside confessions extorted from *ignorant* persons who have been subjected to persistent and protracted questioning or who have been *unlawfully* held *incommunicado* without advice of friends or counsel.

Ward v. Texas, *supra*, 555."

We respectfully submit, therefore, that the State of Tennessee, through its Learned Attorney General, concedes and admits that the constitutional rights of these defendants were violated by the officers of Shelby County, Tennessee, and the prosecuting attorney and his assistant, Mr. Battle, in their treatment of these defendants, in an effort to force these alleged confessions upon which they stand convicted here.

It is admitted, we submit, by the state, that the rights of these defendants, as reflected by the record in this case, fall completely under the protecting canopy of the opinions and decisions of this Honorable Court, and particularly in the cases of:

Anderson v. United States, 87 L. Ed. 589.

Chambers v. Florida, 309 U. S. 227, 84 L. Ed. 419.

McNabb v. United States, 87 U. S. 579.

White v. State of Texas, 310 U. S. 530.

Ziang Sun Wan v. United States, 266 U. S. 1, 69 L. Ed. 131.

Ward v. Texas, 316 U. S. 547.

Brown v. Miss., 297 U. S. 278, 80 L. Ed. 682.

To the admissions above quoted from the briefs filed in behalf of the State of Tennessee, there must be added the uncontroverted fact that Mr. Ashcraft, from seven o'clock Saturday evening, June 14th, until approximately 10 o'clock the following Monday morning, when his alleged confession was completed, was not allowed to sleep one wink. He was constantly quizzed in relays by the officers and was not al-

lowed to close his eyes in sleep. The record affirmatively shows this to be an absolute fact, sworn to by all of the witnesses for the state. See:

Rec. Page 55 Testimony Ezell.

Rec. Page 93 Testimony Becker.

Rec. Page 200 Testimony Ashcraft.

Rec. Page 294 Testimony Battle.

This, we submit, constituted a torture in itself beyond expression, and must not be countenanced. We are giving this honorable court a picture of these tortures reflected in the record by the testimony of the witnesses for the State.

The testimony of Mr. Ashcraft simply enlarges upon the tortures administered by the officers and the attorney general's office, and exhibits the extent to which the constitutional rights of these defendants were violated, and the reprehensibleness of the activities of the officers and the attorney general's office, in whose charge they were. Our own Supreme Court of Tennessee, we might say in passing, has unequivocally held that confessions secured by depriving a defendant of sleep, are wrongfully taken, illegal as evidence against a defendant, and in violation of the rights of a defendant under the Constitution of the United States.

It is so held in the late case of

Rounds v. The State 171 Tenn. page 512.

In this case the Tennessee Supreme Court had the following to say:

"Rounds said that he did not sleep more than two hours from Monday night until Friday morning. Although this statement may not be strictly accurate, we think it evident from the record that he was kept awake most of the time.

"To deprive a human of sleep for four days and nights is a form of torture not less severe than physical vio-

lence. See *Ziang Sun Wan v. United States*, 266 U. S. 1, 45 S. Ct., 1, 69 L. Ed., 131." * * *

"Whether the officers subjected this defendant to physical violence was a matter of controversy on the trial below and we need not go into that. That the officers did subject him to a course of treatment—keeping him awake as stated—that rendered him hysterical and necessitated the attendance of a physician is perfectly obvious."

"(3) A confession so obtained is not admissible. Resort to torture, IN ANY FORM, by officers of the law, is not to be countenanced." (CAPS OURS.)

"In *Brown v. Mississippi*, 297 U. S., 278, 56 S. Ct., 461, 80 L. Ed., 682, the Supreme Court of the United States has recently held that the use of a confession obtained by torture is a denial of due process under the Fourteenth Amendment to the Federal Constitution, and we think it immaterial whether the torture was administered by brute force or by some method more refined."

How the Supreme Court of Tennessee could affirm this Ashcraft-Ware case in the light of this opinion and other opinions of our own Supreme Court is beyond our ability to comprehend. It is our view that Judge Neil, who dissented, was eminently correct in his position.

We respectfully submit that this court would be justified in reversing the ruling of the Supreme Court of Tennessee in this (Ashcraft-Ware) case, upon the above authority, and upon the decisions of this honorable court handed down since its decision in the *Brown* case.

NOW MAY IT PLEASE THE COURT:

What is the argument set forth in the briefs for the State of Tennessee under which this court is asked to sustain the conviction of these defendants here? The crux of this argument is that the defendant, Ashcraft, is a man above the ordinary in intelligence,

This argument is reflected in the first brief filed by the State of Tennessee, wherein it is said:

"However, the respondent respectfully insists that the present case does not go to the extent of falling within the authority of those cases. In substantially each of them, the person from whom the confession was extorted seems to have been an ignorant, illiterate, impecunious member of the colored race, etc., etc." (Page 12.)

"In the present case however, the petitioner does not appear to be by any means illiterate or a person of weak mentality." (Page 13.)

We submit, may it please the court, that there is absolutely no testimony in the record upon which this argument can be based. There is not one line of evidence in the record to the effect that Ashcraft is a "man of above the average intelligence". On the other hand, the record affirmatively shows that he is a man unlearned, unlettered, illiterate, and of low intelligence mentally. The only evidence in the record on the subject is as follows: (Page 212 of the Rec.)

"By General Gerber:

Q. Mr. Ashcraft, let me say at the very outset that I am going to ask you very few questions, and if I ask you any questions that you don't understand, let me know and I'll repeat it.

A. All right.

Q. You were born in Gillette, Arkansas?

A. Yes, Sir.

Q. And you lived in Gillette how long?

A. I don't know exactly.

Q. About how long?

A. I left home there and went to work and made my own living from the time I was 11 years old.

Q. How old were you when you left Gillette, Arkansas?

A. Eleven years old.

Q. Where did you go from there?

A. I went down between Gillette and Stuttgart and worked on a farm.

Q. You stayed there how long?

A. I don't know; that's too far back."

This is all the evidence in the record on the subject.

Here, therefore, may it please the court, we have a man born in a little village of Gillette, in the southeastern part of Arkansas, leaving home when he was eleven years old, to make his own living. He could not have reached more than the third or fourth grade in school at best. This defendant, Ashcraft, is as illiterate a man as this colored man, defendant Ware. He (Ware) testified that he reached the fourth or fifth grade in school. (Rec. 264.)

Be it said to the credit of Ashcraft that he did make a good citizen of himself by working with his hands, and became an expert operator of a drag-line and steam shovel machine. This work was manual and not mental.

This record reflects that he had the confidence and the good will of every contractor that he ever came in contact with, government or otherwise. He is a fine gentleman, of exemplary habits and good character, so we see that the argument of the State to the effect that Ashcraft was a man of above the average in intelligence is not well founded.

Counsel for the State of Tennessee, seeking consolation any where he might find it, bases this argument upon certain excerpts found in some of the opinions of this honorable Court in the cases relied on here where reference is made to the ignorance of the defendants under discussion.

We submit that this argument should be by the court disregarded as of no effect under this record.

Treatment of Defendant John Ware.

Counsel for the State of Tennessee, in his briefs as we read them would leave the impression that the defendant, Ware, very quickly gave his confession.

We submit that the record does not support this contention.

What are the facts? At about 12 o'clock, on the night of June 15th, the officers, with Attorney General Battle, and Mr. Ashcraft, suddenly broke into the little room where John Ware, his wife, and a kinsman were sleeping in bed together. Flashlights were thrown in his eyes and he was ordered to get up and put on his clothes.

Obviously this scared this young negro man literally to death. He says that when he was being taken down the steps of his home to the car, that he was knocked in the head and to his knees and literally picked up and lifted into the automobile by the officers (R. 255). We submit that from this minute on, this young negro boy never had a mind of his own. He was wholly under the dominion of the officers and the attorney general of Shelby County, Tennessee, from fear of his life, and safety. He says that he was brought to the Shelby County jail shortly after 12 o'clock midnight, and after being talked to by the officers for a while, he was placed in a dry cell, a padded cell, a sweat box, a cell of solitary confinement, a cage, and threatened with mob violence. That he began to cry, and was hysterical from fear.

He testifies that he was asked if he did not know what happened to negroes who murdered a white woman in Mississippi, and that if he did not know what a mob was. He stated that he did know. He was then taken out of the padded cell or dungeon, as he called it in his testimony, and told the officers that he would confess to anything or say

what they wanted him to say if they would not turn him over to the mob (R. 258-259).

It is true that this testimony on the part of Ware is contradicted by the officers. Just here may we interpolate to say that from the reading of practically all the cases in the books on this subject, we find that in all of them the officers deny all acts of violence and oppression.

However, we submit that only one conclusion can be drawn from the testimony of Ware in respect to his being placed in this dungeon or cell of solitary confinement in the Criminal Courts Building of Shelby County, Tennessee, and that is that he was placed there. The officers knew or had ascertained from him that he had lived in the State of Mississippi. Defendant Ware, twenty years old, had never been in the jail where he was brought in that night at 12 o'clock. It is in the record that there is such a cell, or cage, set off by itself in the Criminal Courts Building. It is a secret cell. Defendant Ware never would have known that such a cell existed if he had not been actually placed in it. Therefore, we say that there can be no doubt that John Ware was confined in this cell or cage of solitary confinement, this dungeon, or that he was, in fact, threatened with mob violence. He testifies that he was in a hysterical condition in this cell and cried and pleaded with the officers not to turn him over to the mob.

He (Ware) was taken before the public stenographer, Mr. Waldauer, for the purpose of taking down in shorthand his confession. This happened at 2:15 A. M. on the morning of June 16th.

From the Rec. page 138—Testimony, Waldauer:

“Q. Will you tell us what time or about what time you started taking this statement of John Ware?

A. At 2.15 A. M.”

From approximately twelve o'clock midnight until 2:15 A. M. on the morning of Monday, June 16th, all of the pressure and power of the officers and the attorney general's office of Shelby County, Tennessee, had been brought to bear and was centered on getting a confession from the defendant, John Ware.

Defendant Ashcraft was in the custody of officers on the fifth floor of the Shelby County jail and being questioned by officers during this time.

Public Stenographer Waldauer began the taking of what is purported to be Ashcraft's statement at 7:10 o'clock Monday morning, June 16th, after Ware is alleged to have confessed.

"Q. At that time, state to the jury whether any statement was taken from the defendant Ashcraft?

A. Yes, sir, beginning at 7.10 A. M."

Rec. Page 143—Waldauer Testimony.

We submit that it is extremely significant in this record that General Gerber, the attorney general of Shelby County, who was at the county jail supervising all of these proceedings with reference to these alleged confessions, at 2:00 o'clock Monday morning, June 16th, called a court reporter, Henry Waldauer, at his home, and told him that he wanted him to come immediately to the jail, that defendant Ashcraft was about to make a confession and he wanted him to take it down and that when he (Waldauer) arrived at the county jail and was told by Attorney General Gerber that he was not to take any statement from Ashcraft, but that he was to take a statement from defendant John Ware (R. 148 Waldauer cross-examination).

The only conclusion to draw from this testimony is that no alleged confession satisfactory to the attorney general of Shelby County, Tennessee, had been obtained from de-

fendant Ashcraft until 7:10 o'clock Monday morning, June 16th, after they had finished with defendant John Ware, approximately five hours having elapsed. It is perfectly obvious from this record that these defendants were submitted to torture, duress, intimidation, coercion, abuse, and threats, at the hands of the officers of Shelby County, Tennessee, and the attorney general's office until alleged statements and admissions were secured from the defendants satisfactory to the attorney general of Shelby County, Tennessee, who was present.

Counsel for the State of Tennessee, in his briefs as we read them, advances the idea that we are relying principally for relief in this case upon the opinion of this court handed down in the case of *McNabb v. United States*, 318, U. S. 332. If he entertains this view, we submit to the court that he is entirely in error. We cite the *McNabb* case for its applicability to the facts set forth in the record in this case. It is perfectly apparent that it is applicable here. However, the other numerous cases decided by this court from *Chambers v. Florida* on down to the present moment that fit the facts of this case like a glove, and are, as we assert, controlling and without exception sustain the position advanced in behalf of these defendants upon this honorable court.

In addition to all of the other supporting authorities, that is to say, cases cited in our original petition for certiorari, and in this brief, we invoke and plant ourselves upon the holding of this court in the case of *Ward v. Tex.* 316 U. S. 547. In the last paragraph of the opinion of this honorable court in this case, we find the following:

"This Court has set aside convictions based upon confessions extorted from ignorant persons who have been subjected to persistent and protracted questioning, or who have been threatened with mob violence, or who have been unlawfully held incommunicado without

advice of friends or counsel, or who have been taken at night to lonely and isolated places for questioning. Any one of these grounds would be sufficient cause for reversal. All of them are to be found in this case.

The use of a confession obtained under such circumstances is a denial of due process and the judgment of conviction must be reversed.

Reversed."

We submit that practically every ground for a reversal enumerated by this honorable court as above quoted exists in this record, and that the case should be by this honorable court reversed to the end that justice may be meted out to them.

Respectfully submitted,

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